Nos. 80-54 and 80-5049

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a corporation,
Petitioner,

vs.

CLIFFORD E. CLAYTON.
Respondent.

CLIFFORD E. CLAYTON,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, LOCAL NO. 509,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF SAFEWAY STORES, INCORPORATED AND DELTA LINES, INC.

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QUESTIONS PRESENTED

Case No. 80-5049.

1) Does a discharged employee's failure to exhaust his internal union remedies, found at trial to be full, fair and adequate, bar his fair representation action against the UAW?

Case No. 80-54.

1) Does employee's failure to exhaust internal union remedies, which were found to be adequate by district court, bar his action against company as well as union?

2) Does the fact that internal union remedies only provide monetary damages and do not provide for reinstatement make those remedies "inadequate" as defense for company?

3) May internal union remedies be deemed adequate to bar action against union because of employee's failure to exhaust those remedies, but be deemed inadequate to bar action against company because they cannot provide reinstatement of grievance?

4) Is union necessary and indispensable party for employee to prove that union breached its duty of fair representation?

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AMICUS CURIAE BRIEF ON BEHALF OF SAFEWAY STORES, INCORPORATED AND DELTA LINES, INC.

IDENTIFICATION OF PARTIES SUPPORTED

The instant amicus curiae brief is filed in partial support of the positions asserted by International Union, United Automobile, Aerospace and Agricultural Implement Work-

ers of America and United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 509, Respondents in Case No. 80-5049 (hereinafter referred to as the "Union" or the "UAW") and in full support of the positions asserted by ITT Gilfillan, A Division of International Telephone and Telegraph Corporation, Petitioner in Case No. 80-54 (hereinafter referred to as "ITT").[1]

INTEREST OF AMICUS CURIAE

Safeway Stores, Incorporated is currently party to more than 100 collective bargaining agreements containing grievance and arbitration procedures as the exclusive means for resolving grievances thereunder. Delta Lines, Inc. is also party to numerous collective bargaining agreements containing such exclusive grievance and arbitration procedures. As a party to these numerous agreements, each amicus curiae has a strong interest in assuring that the rules of law applicable to suits brought under Section 301 of the Labor-Management Relations Act, as amended (29 U.S.C. § 185) enhance the ability of such grievance and arbitration procedures to fully and finally resolve contractual disputes.

SUMMARY OF ARGUMENT

The action giving rise to this proceeding is a suit by Clifford E. Clayton (hereinafter referred to as "Clayton"), a former employee of ITT, alleging that his union breached its duty to afford him fair representation by failing to pursue a grievance against his termination and further alleging that ITT breached the governing collective bargaining agreement by effectuating that termination. Clay-

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[1]The Jurisdictional Statement, list of Statutory Provisions Involved and Statement of the Case contained within the brief submitted this date by ITT are adopted in their entirety in support of the positions asserted herein.

ton admittedly failed to exhaust available intra-union avenues of redress. The district court dismissed both causes of action when Clayton's failure to exhaust such remedies was asserted as a defense. The Court of Appeals for the Ninth Circuit affirmed the lower court's decision as to dismissal of the union but reversed as to dismissal of ITT. *Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir. 1980). In Case No. 80-5049, Clayton claims that dismissal of the union was improper. In Case No. 80-54, ITT claims, principally, that Clayton's failure to exhaust available intra-union remedies requires dismissal of both defendants.

The following argument urges that the exhaustion defense[2] is a sound defense consistent with the statutory interests which originally caused judicial recognition of a duty on the part of unions to fairly represent bargaining unit members. Four rationales are discussed in support of this argument. Each of these rationales is examined to determine whether it suggests that employers, as well as unions, may assert the defense. In each case, it is found appropriate to extend the benefits of the exhaustion defense to employers as well as unions. Upon completion of this analysis, three deleterious effects which would ensue from a contrary result are examined in detail.

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[2]Two types of exhaustion defenses may potentially be raised in litigation of this type. In some cases, it may be alleged that the plaintiff has failed to exhaust contractual remedies contained within the governing collective bargaining agreement by, for example, failing to file or pursue a grievance under an agreement recognizing the ability of employees to take these actions. Secondly, it may be alleged that the plaintiff has failed to exhaust available intra-union avenues of redress, as was alleged in the present proceedings. The term "exhaustion defense" will be used to refer to the second type of exhaustion defense hereinafter unless expressly clarified to the contrary.

ARGUMENT

A. The Exhaustion Defense Is Consistent With The Statutory Interests Served By Recognition Of A Duty To Fairly Represent Employees And Should Be Available To Both Unions and Employers.

Federal courts in nearly all circuits have long recognized that exhaustion of adequate intra-union remedies is a prerequisite for any suit alleging that an employee's union has breached its duty of fair representation. See, e.g., *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968). The courts which have been called upon to discuss this prerequisite, however, have offered several competing rationales for its existence. Most such rationales have received criticism, to some degree, from commentators. This brief will establish the viability of four alternative rationales which have been offered to support the exhaustion defense and will state the reasons why each such rationale compels that defendant employers, as well as defendant unions, be permitted to claim the benefit of that defense. Before the appropriateness of these four rationales may be discussed cogently, however, it is necessary to clarify the nature of the now well-established cause of action for breach of a union's duty of fair representation. That cause of action has been variously characterized by federal courts and the propriety of the exhaustion defense cannot be tested without a clear understanding of the cause of action to which it responds.

The need to characterize an employee's cause of action for breach of a union's duty to provide fair representation has generally arisen when courts have been called upon to decide which statute of limitations is applicable to such actions. In this context, the First and Fifth Circuits have characterized the action as one in tort. *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973); *De Arroyo v. Sindicato de Trabajadores Packing House,*

AFL-CIO, 425 F.2d 281, 286 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). In the same context, the Second and Eighth Circuits have characterized the action as one on a written contract. *Butler v. Local 823, Int'l Brotherhood of Teamsters*, 514 F.2d 442, 446 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1979), *cert. denied*, 401 U.S. 1009 (1971).

Characterization of the action as one in tort or contract, however, does not accurately explain the source of a union's duty to provide fair representation. That source is, inescabably, ". . . a federal obligation which has been judicially fashioned from national labor statutes." *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251 (2d Cir. 1970).

A duty on the part of unions to provide fair representation was first recognized by the United States Supreme Court in *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). That case dealt with the Railway Labor Act (45 U.S.C. § 151 *et seq.*) which provides for certification of labor organizations as exclusive collective bargaining representatives when designated by a majority of the members in a craft or class. The Court observed that such certification provisions conferred special rights on labor organizations which were accompanied by specific responsibilities and held as follows:

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." 323 U.S. at 202.

The Court later held that a similar *statutory* obligation to provide fair representation arises from those portions

of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (hereinafter referred to as the "Act" or the "NLRA") which provide for exclusive recognition of labor organizations by covered employers. As stated by the Court of Appeals for the Ninth Circuit in *Kaiser v. Local No. 83*, 577 F.2d 642, 645 (9th Cir. 1978):

> "In *Vaca* [*Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)] and *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970) the Supreme Court has made clear that an employee's action against his union for violation of the *statutory duty of fair representation* is separate and distinct from the contractual duty of an employer both as to the origin of the liability and the amount of damages." (italics added).

The foregoing makes clear that the responsibility of unions to provide fair representation is an obligation arising from those federal statutes which permit, and many times require, exclusive recognition of labor organizations. This fact is of some moment because it clarifies two facts critical to proper assessment of any defense offered to an action alleging breach of the duty to afford fair representation. First, it is clear that the duty has been judicially created; it has not been created by contracting parties or other private actions. This fact suggests that judicial discretion may be applied in assessing defenses asserted in actions alleging breach of duty. Secondly, it is clear that the duty has been judicially created *in order to serve statutory interests.* Those statutory interests, as defined in *Vaca v. Sipes, supra,* must, therefore, determine the desirability of the exhaustion defense, when made available to either unions or employers.

Those federal courts which have recognized the exhaustion defense to date have supported it through reference

to one or more of four rationales. It has been most prevalent to support the defense as a contract right upon which a defendant union may insist. Union constitutions affording intra-union avenues of redress have been found to constitute binding contracts between labor organizations and their members. The second rationale most frequently relied upon by federal courts suggests that the defense is a worthy means of conserving judicial resources. Courts relying upon this rationale suggest that demanding exhaustion of intra-union remedies may preclude the need for plaintiffs to pursue meritorious cases by conferring the relief which they seek and may sharpen the facts in other cases so as to permit easier judicial resolution. A third rationale for the exhaustion defense has been frequently noted by federal courts in connection with the desirability of protecting judicial resources. Courts have reasoned that interference with internal union affairs should be avoided whenever possible and that the exhaustion defense is an appropriate means of affording labor organizations a first opportunity to ameliorate internal conflict.

A fourth rationale has been relied upon to support the exhaustion defense which is of particular note. Several courts have found that available intra-union remedies are an integral part of the entire collective bargaining process and that a cause of action for breach of the union's duty to provide fair representation cannot be found to have arisen *unless* the union has been provided with an opportunity to display its good or bad faith through this process. In essence, courts relying upon this rationale have found that exhaustion of intra-union remedies is an *essential element* of any cause of action for breach of the union's duty to provide fair representation.

When each of the four rationales summarized above are tested against the statutory interests recognized in *Vaca v. Sipes, supra*, it becomes apparent that the exhaustion

defense, and its availability to employers as well as unions, are critical to interests sought to be served by federal labor policy. The following discussion establishes the bases for so concluding. For ease of reference, the four rationales discussed above will be referred to hereinafter, respectively, as: 1) the contract theory, 2) the judicial economy theory, 3) the nonintervention theory, and 4) the essential element theory.

1. The Contract Theory.

As noted above, most federal courts recognizing the exhaustion defense have found it compelled as a matter of contract between the defendant union and any plaintiff member. See, e.g., *Geddes v. Chrysler Corp.*, 608 F.2d 261 (6th Cir. 1979); *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977); *Anderson v. Grocer's Supply Co., Inc.*, 483 F.Supp. 73 (S.D. Tex. 1979). As stated in *Harrison v. Chrysler Corp., supra,*

> "The exhaustion requirement is based primarily on a contractual obligation to exhaust internal union remedies, assumed by the member upon joining the union and embodied in the union's constitution and regulations." 558 F.2d at 1277.

This rationale for the exhaustion defense has been criticized by commentators on two grounds.[3] First, commentators have urged that the inability of individual union members to control the terms contained within their union constitution militates against finding members contractually bound to follow its procedures. In essence, such constitutions have been characterized as contracts of adhesion.

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[3]See, e.g., *Fox & Sonenthal, Section 301 and Exhaustion of Intra-Union Appeals; A Misbegotten Marriage,* 128 U. Penn. L. Rev. 989 (1980).

Secondly, commentators have urged that premising the exhaustion defense on this ground unfairly produces conflicting results when similar suits are brought by a union member within the bargaining unit and a nonunion member within the bargaining unit. Although intra-union remedies may be available to the latter employee under the applicable constitution, that individual will have no contractual obligation to pursue those remedies.

Interestingly enough, the two bases upon which this rationale has been criticized tend to defeat each other. The very fact that employees in a bargaining unit may choose to become or not become full-fledged members of the union obligated to represent them (*NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975)), establishes that union constitutions are not contracts of adhesion. There is, therefore, no basis for declining to enforce constitutional provisions requiring exhaustion of intra-union remedies prior to suit. In fact, as noted by the court below in this matter, Congress expressly recognized the enforceability of such provisions in 29 U.S.C. Section 411(a)(4). 623 F.2d at 566, fn. 2.

Courts relying upon this rationale for the exhaustion defense have generally found it to militate against allowing a defendant employer to claim the benefit of the defense. The reasoning of the Court of Appeals for the Sixth Circuit in *Geddes v. Chrysler Corp., supra,* is typical:

> "The intra-union remedies, on the other hand, are part of a separate membership agreement between the union and the members; the employer has no interest in the agreement and has no right to rely on its provisions in seeking dismissal of a claim against the employer." 608 F.2d at 264.

See also, *Anderson v. Grocer's Supply Co., Inc.*, 483 F.Supp. 73, 76 (S.D. Tex. 1979).

The better view, however, recognizes that in most instances the employer has a contractual interest which is integrated with the defendant union's interests in securing enforcement of its constitution. Nearly all collective bargaining agreements contain a provision granting the contracting union recognition as the exclusive collective bargaining representative of covered employees. The collective bargaining agreement governing in the present case is no exception (A 29). Such a provision requires the contracting employer to bargain exclusively with the recognized union for the term of the contract and also requires the contracting union to serve as the exclusive representative of bargaining unit employees for that same term. Typically, this recognition clause tracks closely the terms of 29 U.S.C. Section 159, that portion of the NLRA which the Supreme Court found to impose a duty to provide fair representation in *Vaca v. Sipes, supra.*

If the NLRA's provisions for exclusive recognition impose a duty to fairly represent employees, as found in *Vaca v. Sipes, supra,* then contractual effectuation of those provisions through use of identical terms conferring exclusive recognition *must* give rise to a *contractual* obligation on the part of the union to afford fair representation. In a typical recognition clause, such as the one contained within the collective bargaining agreement governing in this case, the union has contractually bound itself to exclusively (and by implication *fairly*) represent all members of the bargaining unit. The right to insist upon compliance with this commitment is exceedingly important to all contracting employers; unless this contractual benefit is received, no grievance and arbitration procedure may be relied upon as a successful means for fully and finally resolving disputes and preventing labor unrest.

Since an employer such as ITT has a contractual right to demand that a union to which it has extended exclusive

recognition *fairly* represent bargaining unit employees, the employer becomes, in essence, a third party beneficiary to any separate contracts into which the union enters for the purpose of assuring that employees are afforded fair representation. In other words, an employer such as ITT should be regarded as a third party beneficiary of the UAW's constitutional provisions seeking to assure that any unfair or arbitrary representation will be promptly corrected. ITT, as well as the union, should be entitled to insist upon the exhaustion of constitutional provisions designed to remedy unfair representation because it has a contractual right to demand such fair representation. Any other analysis renders a union commitment to serve as exclusive representative hollow and improperly deprives the employer of its right to see grievances fairly, fully and finally resolved through the exclusive grievance and arbitration procedure contained in any agreement.

At least one federal court has recognized the compelling nature of the foregoing analysis when employer contract rights are analyzed as part of the integrated collective bargaining process. The Court of Appeals for the Seventh Circuit stated as follows in *Harrison v. Chrysler Corp., supra:*

> "The question presented is whether the employee owes an obligation to the employer to exhaust available methods of reviving a stalled grievance procedure before abandoning that procedure and resorting to the courts for relief. *We believe such an obligation is implied under a collective bargaining agreement which, like the one in this case, reposes in the union exclusive authority to represent the employee in contractual claims against the employer and which provides grievance machinery as the exclusive method of resolving those claims.*" 558 F.2d at 1278.

Quite clearly, full effectuation of *all* parties' contractual rights requires that the exhaustion defense be made available to employers as well as unions. This conclusion is compelled when the statutory origins of the duty to fairly represent employees are logically applied to the recognition provisions typical of all collective bargaining agreements.[4]

2. The Judicial Economy Theory.

As noted above, numerous federal courts have recognized the exhaustion defense as a legitimate tool for the preservation of judicial resources. The increasing burden upon federal courts is now, unfortunately, notorious. Quite obviously any policy which relieves a portion of that burden without sacrificing the judicious resolution of any dispute should be pursued vigorously. To the extent that judicial resources can be conserved through recognition of the exhaustion defense, therefore, it should be fully honored whether asserted by a defendant union or a defendant employer.

Several courts which have recognized the conservation of judicial resources as a valid basis for recognizing the exhaustion defense have fallen short of dismissing *all* cases in which a plaintiff such as Clayton has failed to exhaust available intra-union remedies. Several such courts have ruled that judicial economy warrants dismissal of a breach of fair duty suit on the grounds that the plain-

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[4]Although the reasoning of the Court of Appeals for the Seventh Circuit leads to this conclusion, that Court of Appeals has declined to permit use of the exhaustion defense by employers *unless* available intra-union channels of redress have the ability to award the plaintiff the exact same relief sought in federal court. Limitation of the exhaustion defense to such situations is the product of fallacies best explained in connection with the second rationale discussed herein, namely, the judicial economy theory.

tiff has failed to exhaust intra-union remedies *only* if available intra-union tribunals have the express authority to confer all remedies sought by the plaintiff in federal court. Such courts have declined to dismiss breach of contract claims seeking reinstatement on the grounds that intra-union tribunals may not compel reinstatement by a former employer. See, e.g., *Baldini v. Local Union No. 1095, UAW,* 581 F.2d 145, 150 (7th Cir. 1978). Upon careful examination, however, it must be concluded that interests of judicial economy compel recognition of the exhaustion defense in *all* circumstances, not merely those where the intra-union tribunal involved directly possesses the authority to confer all relief sought in federal court.

This conclusion is compelled for two reasons. First, it must be remembered that all breach of fair duty/breach of contract actions brought in federal court are *not* meritorious. While empirical data is not available as to the percentage of such suits which eventually prove meritorious, it may safely be assumed that many, if not most, are nonmeritorious. Extra judicial means which assist in identifying and quickly resolving those disputes which are *nonmeritorious* are just as important to the preservation of judicial resources as are extra judicial means which assist in the identification and prompt resolution of meritorious disputes. Almost every federal court to have commented on the exhaustion defense has acknowledged that requiring breach of fair duty plaintiffs to exhaust their intra-union remedies invariably serves to expose valuable evidence directly bearing upon critical issues such as the good or bad faith of involved union representatives, the extent of their investigative and representative efforts and other factual questions which could be made the subject of prolonged discovery and litigation in federal court. See, e.g., *Neipert v. Arthur G. McKee & Company,* 448 F.Supp. 206

(E.D. Pa. 1978). The ability of intra-union remedies to provide such information was expressly acknowledged by the Court of Appeals when it rendered its decision in the present matter:

> "The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. *But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compelling a record that would greatly assist the court now.*" 623 F.2d at 566.

Such information is of immense value to a federal court hearing a breach of fair duty/breach of contract action even *if* intra-union avenues of redress are not so broad as to preclude all need for litigation. The value of intra-union remedies as a method for shortening litigation must not be ignored on the sole grounds that a particular intra-union tribunal does not possess the authority to preclude all need for further pursuit of a meritorious claim. The very fact that intra-union remedies may assist the court in promptly identifying meritorious and nonmeritorious claims is of sufficient benefit to warrant recognizing the exhaustion defense on the grounds of judicial economy.

There is a further reason that interests of judicial economy compel recognition of the exhaustion defense in *all* breach of fair duty/breach of contract cases. When such a suit is brought, the defendant union and defendant employer are generally party to an ongoing collective bargaining relationship effecting the terms and conditions of employment for numerous individuals and requiring constant discussion of disputes. *If* a meritorious claim asserting that the union has breached its duty of fair representa-

tion is *promptly* brought to the attention of officials through intra-union appeals, the union is generally in an excellent position to secure a voluntary resolution of the dispute with the employer's cooperation. Most employers are now quite knowledgeable of their potential liability in direct suits asserting breach of contract under the standards set forth in *Vaca v. Sipes, supra.* If union officials gain knowledge of a meritorious claim *promptly* and bring this claim to the employer's attention, voluntary resolution is likely *even in situations where the express terms of the governing contract appear to preclude further grievance processing.* In situations where the potential co-defendants must deal with each other on a day-to-day basis and several disputes of varying importance are typically outstanding at all times, it is generally possible for a union to secure such voluntary resolution *in cases which warrant it* by making a comparable concession to the employer in another area of dispute where the facts suggest that concession is appropriate. In short, in the ongoing give and take of an established collective bargaining relationship voluntary resolution of a claim shown to be quite meritorious is *likely even* where further pursuit of a grievance appears precluded by the governing collective bargaining agreement.

At least one court of appeals has urged that such reasoning should not prevail. In *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit stated, "There is no basis for assuming that Chrysler willingly would have exposed itself to the very liability that it resists in this action." 558 F.2d 1273. This analysis ignores certain critical facts all too well known to frequent litigants in this area. By the time determinative facts are crystallized through federal discovery procedures, potential damages are generally far greater, and settlement demands higher than they would have been in the early stages of an intra-union appeal. Settlement loses its attractiveness once prolonged litiga-

tion has occurred because its costs no longer compare so favorably to the costs of litigation. In short, settlement of meritorious claims, thereby preserving judicial resources is *most* likely to occur if *prompt* resort to intra-union remedies is consistently compelled by federal courts in this area. Such a policy is clearly consistent with the statutory interests recognized by the Supreme Court in *Vaca v. Sipes, supra.* In that decision, the Court stressed the importance of the settlement process in effectuating federal labor policy and assuring resolution of labor disputes likely to be both prompt and judicious (386 U.S. at 191). In short, both federal labor policy and the conservation of judicial resources compel that the exhaustion defense be recognized in all breach of fair duty/breach of contract actions and that defendant employers, as well as defendant unions, be afforded the benefit of that defense.

3. Nonintervention Theory.

The court below acknowledged that, "a primary reason for requiring exhaustion is to forestall unnecessary interference with union affairs." 623 F.2d at 566. This view finds abundant support in decisions in other federal courts. See, e.g., *Geddes v. Chrysler Corp., supra; Baldini v. Local Union No. 1095, UAW, supra; Harrison v. Chrysler Corp., supra; Anderson v. Grocer's Supply Co., Inc., supra; Aldridge v. Ludwig Honold Mfg. Co.,* 385 F.Supp. 695 (E.D. Pa. 1974). This reason for recognizing the exhaustion defense applies with equal force in the case of employer defendants as it does in the case of union defendants. *Vaca v. Sipes, supra,* clearly established that a Section 301 action alleging breach of contract *cannot* be successfully maintained against an employer *unless* the plaintiff establishes, as a prerequisite, that his union breached its duty of fair representation toward him and that the plaintiff was thereby prevented from pursuing any

available contractual grievance and arbitration procedure. As stated by the court in that decision:

> ". . . [W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.*" 386 U.S. at 186.

This means that should the cause of action against the union be dismissed in a breach of fair duty/breach of contract action, the court will *still* have to resolve the merits of the dismissed action against the union *before* disposition of the remaining cause against the employer. Dismissal of a union defendant without dismissing the employer defendant does *not* preclude "interference with union affairs." To the contrary, it potentially causes far greater interference. The internal operations of the dismissed defendant union will be scrutinized and second-guessed *without* the benefit of the union's full participation as a party to the litigation. The interference under this circumstance is likely to be more extreme and misconstruction of internal union affairs and operations is more prone to occur. In sum, the appropriate federal interest of forestalling unnecessary interference with union affairs can only be served if both employers and unions are permitted to assert the exhaustion defense, thereby making certain that union operations and the exercise of union discretion will not be scrutinized before appropriate union officials have had an opportunity to review and comment on the operations of their own organization.

4. Essential Element Theory.

As discussed in the foregoing sections, intra-union remedies must be regarded as one element of an integrated

collective bargaining process. As stated in Section A, 1, *supra,* in most cases employers have a contractual right to see that intra-union procedures are exhausted, where available, in order to secure fair representation. As stated in Section A, 2, *supra,* intra-union appeals frequently play a part in the dispute resolution process and may often serve as the catalyst for voluntary resolution of disputes. In light of these facts, it is inappropriate to regard the exhaustion defense as a *procedural* defense in a breach of fair duty/breach of contract action. In truth, no cause of action for breach of a union's duty of fair representation or a breach of contract can *arise* until this critical aspect of the collective bargaining process has been exhausted, thereby affording the grievance and arbitration procedure a full opportunity to operate effectively and affording union officers a full opportunity to display their good or bad faith. Several federal courts have analyzed the exhaustion defense in this fashion. See, e.g., *Dezura v. Firestone Tire & Rubber Co.*, 470 F.Supp. 121 (E.D. Pa. 1979); *Aldridge v. Ludwig Honold Mfg. Co., supra.* A similar view was stated in *Brookins v. Chrysler Corp.*, 381 F.Supp. 563, 568 (E.D. Mich. 1974) as follows:

> "By exhausting his internal remedies the employee may be able to eliminate the very wrong of which he complains, not merely obtain a remedy therefore in another form. If the union's wrongful refusal to continue the grievance were reversed without prejudice to his rights, the employee would no longer have a cause of action for breach of the duty of fair representation, and consequently would have no right under *Vaca* to sue his employer for breach of contract." 381 F.Supp. at 569.

The court below noted the persuasiveness of the foregoing analysis but ultimately found that, "it does not apply in instances when the employee, by exhausting intra-union

remedies, would not 'be able to eliminate the very wrong of which he [or she] complains.'" 623 F.2d at 569. This limited application of the reasoning set forth in *Brookins v. Chrysler Corp., supra,* is inappropriate for the reasons fully explained in Section A, 2, *supra.* If promptly pursued, intra-union appeals are quite likely to produce voluntary resolution of meritorious claims. Where potential co-defendants are parties to an ongoing collective bargaining relationship there is generally substantial opportunity to resolve such meritorious claims in the give and take of bargaining on outstanding disputes. *Unless* union officials are provided with an opportunity to pursue this avenue of resolution, a breach of the duty of fair representation cannot be found to have taken place. *Vaca v. Sipes, supra,* recognizes that full enhancement of all settlement possibilities is a critical element in the statutory interests served by federal labor policy and, in light of this fact, the exhaustion defense should be recognized as a valid defense available to both unions and employers in all cases where intra-union appeals exist as part of an ongoing collective bargaining relationship.

B. A Contrary Result Would Produce Three Adverse Consequences.

The decision of the Court of Appeals in this matter produces three adverse consequences which are totally deplorable. If the approach followed in the present case is adopted and followed in all similar cases, it will: 1) operate to the extreme prejudice of employers sued for breach of contract, 2) incite collusion between plaintiffs and unions inclined to permit a finding that they have breached the duty of fair representation when, in fact, no such breach has occurred, and 3) render litigation in this area unduly complex.

The prejudice to employers which results from the decision below is acknowledged by the Court of Appeals (623 F.2d at 570). The extreme nature of that prejudice is not, however, acknowledged. The decision finds that dismissal of the UAW was required in light of Clayton's failure to exhaust intra-union appeals because:

> "The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now." 623 F.2d at 566.

Clayton was found precluded from asserting a breach of the UAW's duty of fair representation because he deprived the UAW of the opportunity to establish exculpatory evidence through this process. The court below, however, completely ignored the fact that ITT is *just as entitled* to any information exculpating the union which would have resulted from exhaustion of intra-union appeals as is the union itself. The decision of the Supreme Court in *Vaca v. Sipes, supra,* makes Clayton's cause of action against the company dependent upon his cause of action against the union. Clayton has no valid cause of action against the company unless he can first prove that the union *did* breach its duty of fair representation in handling his grievance. If Clayton's failure to exhaust intra-union appeals and resulting failure to afford the UAW an opportunity to produce exculpatory information through such exhaustion bars his effort to prove union liability, then it must, necessarily, be found to bar the dependent action asserted against the company. A contrary result is blatantly biased and unsup-

portable. This conclusion has been stated clearly in three separate decisions of the United States District Court for the Eastern District of Pennsylvania. *Dezura v. Firestone Tire & Rubber Co.*, 470 F.Supp. 121 (E.D. Pa. 1979); *Kobielnik v. IBT*, 470 F.Supp. 125 (E.D. Pa. 1979); *Neipert v. Arthur G. McKee & Co., supra.*

The prospect that collusion would result from the policy adopted by the Court of Appeals below is equally extreme. When a union is present as a party defendant in litigation of this type, and potentially liable for monetary damages, it clearly has a strong incentive to see that all available evidence of its good faith in processing a grievance is produced and examined. If, however, the cause of action for breach of the union's duty of fair representation is dismissed while the dependent cause of action against the employer is anomalously retained, the union loses all such incentive.

There are many situations in which the union might thereafter be inclined to withhold cooperation from the employer now left defending the union's conduct simply as the result of spite. More frequently, the union will desire to see the plaintiff, its member, prevail and will be tempted to characterize its own actions in any manner likely to produce victory. This result is particularly likely in situations in which the union has actively pursued a grievance to arbitration and the effected employee has filed a breach of fair duty/breach of contract action after losing before the arbitrator. To prevail in such an action, the employee must establish that his representation before the arbitrator was arbitrary, perfunctory or conducted in bad faith. Proof of such bad faith representation is generally difficult if union representatives offer reasonable explanations for the course of action pursued in arbitration. If, however, union representatives have no incentive

to offer such explanations, it becomes markedly more simple for the plaintiff to prevail on the basis of his own testimony. The absence of any potential monetary liability could not help but effect the contributions of union representatives in a case of this type. A union which pursued a member's grievance to arbitration would obviously desire to see that member secure the relief sought in federal court. This strong likelihood of collusion is totally unacceptable in any setting and it is certainly an unacceptable result in a type of case which is becoming increasingly prevalent.

There is a third deleterious effect resulting from the decision of the court below in this matter which further compels rejection of the analysis offered by the Court of Appeals. As noted above (Section A, 1), the employer in cases of this type nearly always possesses a contractual right to demand that the union with whom it has contracted represents members of the bargaining unit fairly. In light of this fact, it would appear that an employer found liable in a Section 301 suit in reliance upon the finding that a breach of the duty of fair representation had been committed, could properly sue the union for contribution alleging breach of that contractual commitment. Such an action would necessarily involve all factual matters presented in the Section 301 suit. Quite clearly, the analysis of the Court of Appeals below produces unduly complex litigation and a preferable approach should be sought and adopted. The preferable approach is to dismiss both the defendant union *and* the defendant employer in any case of this type in which available intra-union avenues of redress have not been exhausted.

CONCLUSION

For these and all of the foregoing reasons, Safeway Stores, Incorporated and Delta Lines, Inc. urge the Court to reverse the decision of the Court of Appeals remanding for trial on the claim against the employer only and direct entry of judgment dismissing the claim against the employer as well as the union.

Respectfully submitted,

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